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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 373

PEOPLE OF THE STATE OF CALIFORNIA and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

PHILLIPS PETROLEUM COMPANY, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, and MOBIL OIL CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Question Presented	4
Statement of the Case	4
A. Proceedings Before the Commission	5
B. Proceedings in the Court Below	6
Reasons for Granting the Writ	7
Conclusion	9
Appendix A: Opinion of Court of Appeals, Tenth Circuit	App. 1
Appendix B: Judgments of Court of Appeals entered on April 18, 1967	App. 4

TABLE OF AUTHORITIES CITED

Court Cases	Pages
Continental Oil Company, *et al.* v. Federal Power Commission (The Permian Basin Area Rate Cases), ... U.S. ..... (Nos. 90, *et al.*, October Term, 1967)	7n, 8, 9
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)	7
People of the State of California and Public Utilities Commission of the State of California v. Skelly Oil Company, *et al.*, ... U.S. ..... (No. 100, October Term, 1967)	8
Phillips Petroleum Company, *et al.* v. Federal Power Commission, ... F.2d ..... (Nos. 8723, *et al.*, 10th Cir., April 18, 1967)	7
Skelly Oil Company, *et al.* v. Federal Power Commission, 375 F.2d 6 (10th Cir. 1967), certiorari granted in Continental Oil Company, *et al.* v. Federal Power Commission (The Permian Basin Area Rate Cases), ... U.S. ..... (Nos. 1274, *et al.*, October Term, 1966)	5n, 6, 7
Federal Power Commission Cases	
Area Rate Proceeding, *et al.*, Docket Nos. AR61-1, *et al.*, Opinion No. 468, 34 FPC 159 (1965)	5, 6, 7, 8
Area Rate Proceeding, *et al.*, Docket Nos. AR61-1, *et al.*, Opinion No. 468-A, 34 FPC 1068 (1965)	5, 6, 7, 8
Statutes	
Natural Gas Act (Act of June 21, 1938, c. 556; 52 Stat. 821, 15 U.S.C. 717-717w, as amended)	2
Section 7	4
Section 7(c)	2
Section 7(e)	4
Section 19(b)	2
United States Code, Title 28, Section 1254(1)	2

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PHILLIPS PETROLEUM COMPANY, UNION OIL COMPANY OF CALIFORNIA, GULF OIL CORPORATION, and MOBIL OIL CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California), respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered on April 18, 1967.[1]

1. Petitioners were intervenors in support of the Federal Power Commission, respondent in the court below. Respondents on this petition for a writ of certiorari were the petitioners in the court below.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A. The Federal Power Commission's Opinion and Order Issuing Certificates and Denying Motion for Severance, Docket No. CP64-211, *et al.*, Opinion No. 484 issued on January 6, 1966, is reported at 35 FPC 40 (J.A. 143-158).[2] Its Order Denying Applications for Rehearing and Denying Stay, Docket No. CP64-211, *et al.*, issued March 4, 1966, is reported at 35 FPC 321 (J.A. 216-224). Its Order Denying Application for Rehearing, Docket No. C162-825 issued March 4, 1966 is reported at 35 FPC 333 (J.A. 215-216).

JURISDICTION

The judgments of the Court of Appeals were entered on April 18, 1967, and are printed in Appendix B. Petitioners herein did not petition for rehearing before the Court of Appeals.[3] The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act.[4]

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are:

> *Section 7(c):* "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the

2. Joint Appendix in the court of appeals.

3. Rule 26 of the United States Court of Appeals for the Tenth Circuit allows twenty days after judgment or decision to petition for rehearing.

4. Act of June 21, 1938, c. 556, § 19, 52 Stat. 831, as amended, 15 U.S.C. 717(r) (1958).

construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

* * * * * * *

Section 7(e): "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

QUESTION PRESENTED

1. In granting certificates of public convenience and necessity to independent producers of natural gas in the Permian Basin pursuant to Section 7 of the Natural Gas Act, did the Federal Power Commission err in issuing certificates with initial prices conditioned to the just and reasonable Permian Basin area rate previously determined by the Commission?

STATEMENT OF THE CASE

This proceeding involves applications for certificates of public convenience and necessity filed by independent producers of natural gas pursuant to Section 7 of the Natural Gas Act for the sale of natural gas from the Permian Basin. They are the first producer certificate applications

to reach the Federal Power Commission (Commission) since its determination of just and reasonable area rates for Permian Basin independent producers in its Opinion Nos. 468 and 468-A.[5]

A. Proceedings Before the Commission

The certificate applications were filed with the Commission prior to the issuance by it of Opinion Nos. 468 and 468-A. Hearings, however, commenced after the issuance of these decisions. In Opinion No. 468 the Commission had set quality standards and base area rates to apply to sales of gas subject to its jurisdiction in the Permian Basin. For the Texas portion of the Permian Basin, the Commission established two base area rates: a higher one at 16.5¢ per Mcf to apply to new gas-well gas, and a lower one at 14.5¢ per Mcf to apply to flowing gas. The date fixed as the cut-off date between flowing and new gas-well gas was January 1, 1961. The base area rates were subject to adjustments for deviations from the quality standards prescribed by the Opinion. Opinion No. 468-A subsequently modified some of these quality standards.

After the close of hearings in this proceeding the Commission granted a motion to waive the Presiding Examiner's intermediate decision and issued its Opinion No. 484 granting certificates. With regard to applicants other than Mobil Oil Corporation (Mobil), the Commission, in condi-

5. *Area Rate Proceeding, et al.,* Docket Nos. AR61-1, *et al.,* Opinion No. 468, 34 FPC 159, issued August 5, 1965; Opinion No. 468-A, 34 FPC 1068, issued October 4, 1965. These Commission orders were reversed and remanded by the United States Court of Appeals for the Tenth Circuit in *Skelly Oil Company, et al. v. Federal Power Commission,* 375 F.2d 6 (10th Cir., 1967), and certiorari was granted by the Supreme Court in *Continental Oil Company, et al. v. Federal Power Commission (The Permian Basin Area Rate Cases),* ..... U.S. ..... (Nos. 1274, *et al.,* October Term, 1966).

tioning the initial price, applied the Permian base area rate for new gas-well gas with provision for determination of appropriate adjustments for quality deviations in accordance with the procedure established in Opinion Nos. 468 and 468-A. The Commission expressly rejected producer contentions that pressure in excess of 500 psi, entitled a producer to an upward adjustment in the price of new gas-well gas.

The Commission found that Mobil's gas met pipeline quality standards, but conditioned the price to the area base rate for flowing gas of 14.5¢ per Mcf rather than the price for new gas-well gas of 16.5¢ per Mcf, rejecting Mobil's contention that its contracts for sale of the gas in Docket No. CI62-825 had been executed after the January 1, 1961, cut-off date. Because Mobil had been selling the gas in question under temporary authorization at the price of 16¢ per Mcf, the Commission deferred decision as to whether refunds should be ordered as a condition to the certificate granted to Mobil.

The Commission also specified, as a condition to the issuance of all certificates, a moratorium on rate increases respecting these sales until January 1, 1968, the same date established in Opinion Nos. 468 and 468-A for moratorium purposes.

B. Proceedings in the Court Below

Four producers[6] sought judicial review of Opinion No. 484 in the United States Court of Appeals for the Tenth Circuit. These cases were briefed before that court issued its opinion and judgment in *Skelly Oil Company, et al. v.*

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6. Phillips Petroleum Co., Union Oil Company of California, Gulf Oil Corporation, and Mobil Oil Corporation. A fifth petition for review filed by Skelly Oil Company was dismissed by order of the court.

Federal Power Commission, 375 F.2d 6 (10th Cir. 1967), which granted all petitions for review which attacked the Commission's Opinion Nos. 468 and 468-A and remanded the cause to the Commission for further proceedings.[7]

In *Skelly*, the court of appeals had declined to accept the Commission's Permian rates because in its judgment these rates had not been measured against the end result test announced in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), stating that on the record presented to the court the rates could not be so measured. It therefore declared that in this review proceeding of Opinion No. 484 it saw no good reason to discuss or decide the points raised by any party. It stated:

> "The Commission's action now before us for review is based on its Permian rates. We have not accepted those rates. The elimination of the base eliminates all rates predicated thereon. . . . We now decide only that the rates fixed by Opinion No. 484 and accompanying orders are disapproved because they are based entirely on the Permian area rates which we have rejected." *Phillips Petroleum Company, et al. v. Federal Power Commission*, ... F.2d ..... (Nos. 8723 *et al.* 10th Cir. April 18, 1967).

REASONS FOR GRANTING THE WRIT

The decision of the court below is premised entirely upon its opinion and judgment in *Skelly Oil Company, et al. v. Federal Power Commission, supra.* That case is presently before this Court for review on petitions for a writ of certiorari, which have been granted. Thus, this Court will soon

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7. This decision by the Tenth Circuit is before this Court for review. *Continental Oil Company, et al. v. Federal Power Commission (The Permian Basin Area Rate Cases)*, Nos. 90 *et al.*, October Term, 1967.

decide whether the Commission's first area rate decisions, Opinion Nos. 468 and 468-A, are valid and lawful.

The views and argument of California supporting the validity of Opinion Nos. 468 and 468-A will be before this Court in *People of the State of California and Public Utilities Commission of the State of California v. Skelly Oil Company, et al.*, No. 100, October Term, 1967, and will not be duplicated here. The decision of this Court in *The Permian Basin Area Rate Cases* will govern, we submit, the proper disposition of this petition for a writ of certiorari. If this Court in those cases reverses the judgment of the court below, thereby affirming the Commission's Opinion Nos. 468 and 468-A, the judgment of the Tenth Circuit in the instant case should be reversed so that the court below may review the questions raised there by the parties. California therefore respectfully requests that this petition for a writ or certiorari be held by this Court until it decides the questions raised in *The Permian Basin Area Rate Cases*. By this procedure, the question whether the instant case should be remanded to the Commission, as now ordered by the court below, or should be reconsidered by that court in the light of this Court's opinion to be issued in *The Permian Basin Area Rate Cases* may be properly decided.

CONCLUSION

Petitioners respectfully submit that this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit should be granted, but we urge that the petition should be held by the Court until its decision in *The Permian Basin Area Rate Cases* is issued.

Respectfully submitted,

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Dated: July 13, 1967

(Appendices Follow)